

STATE OF SOUTH DAKOTA)
 :SS
COUNTY OF MINNEHAHA)

IN CIRCUIT COURT

SECOND JUDICIAL CIRCUIT

EMILY FODNESS, MICHAEL FODNESS,
and CHRISTINE FODNESS,

Plaintiffs,

v.

LEGACY DEVELOPMENT &
CONSULTING COMPANY, LLC, AARON
HULTGREN, HULTGREN
CONSTRUCTION, LLC, BOOMERANG
INVESTMENTS, LLC, CLP INVESTMENTS,
LLC, OLYMPIA REAL ESTATE
HOLDINGS, LLC, and RISE STRUCTURAL
ASSOCIATES, INC.,

Defendants.

CIV. 18-

COMPLAINT

Comes now Plaintiffs, Emily Fodness (“Emily”), Michael Fodness (“Mike”) Christine Fodness (“Chris”) (collectively, “Plaintiffs”), and, by and through their counsel of record, Ballard Spahr LLP, and for their Complaint against Defendants, Legacy Development & Consulting Company, LLC (“Legacy”), Aaron Hultgren (“Hultgren”), Hultgren Construction, LLC (“Hultgren Construction”), Boomerang Investments, LLC (“Boomerang”), CLP Investments, LLC (“CLP”), Olympia Real Estate Holdings, LLC (“Olympia”), and RISE Structural Associates, Inc. (“RISE”) (collectively, “Defendants”) state and allege as follows:

THE PARTIES

1. Plaintiffs Mike and Chris are husband and wife and the parents of Plaintiff Emily.
2. Plaintiffs Mike, Chris, and Emily are all residents of Sioux Falls, South Dakota.
3. Defendant Legacy is a South Dakota limited liability company with its principal place of business located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.

4. Defendant Hultgren is a resident of Sioux Falls, South Dakota.
5. Defendant Hultgren Construction is a South Dakota limited liability company with its principal place of business located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.
6. Defendant Boomerang is a South Dakota limited liability company with its principal place of business located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.
7. Defendant CLP is a South Dakota limited liability company with its principal place of business located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.
8. Defendant Olympia is a South Dakota limited liability company with its principal place of business located at 101 South Main Avenue, Suite 400, Sioux Falls, SD 57104.
9. Defendant RISE is a South Dakota corporation with its principal place of business located at 101 Railroad Avenue, Harrisburg, SD 57032.
10. Upon information and belief, Hultgren is, or was at all relevant times, a member-manager of Legacy, Hultgren Construction, Boomerang, CLP, and Olympia.

JURISDICTION

11. This Court has jurisdiction over this matter pursuant to SDCL § 15-7-2.
12. Venue is proper in this Court pursuant to SDCL §§ 15-5-2 and/or 15-5-6.

FACTS

13. On or about October 1, 2016, Plaintiffs Mike and Chris entered into a lease agreement with CLP and Legacy to rent a loft apartment above the old Copper Lounge. Emily, a college student at the time, periodically resided in the loft apartment with her parents until December 2, 2016. Prior to October 1, 2016, the Fodness' leased the same loft apartment from entities that are not parties to this lawsuit. The lease agreement at issue identifies CLP as the

landlord in the body of the lease and is printed on Legacy letterhead. The lease identifies “Legacy Development & Consulting, LLC” at the bottom of each page of the lease agreement and is signed by “Michelle Blair” as “Owner’s Representative”. Michelle Blair identifies herself as the Property Management Director for Legacy. On or about November 30, 2016 and unbeknownst to Plaintiffs at the time, Plaintiffs’ lease with CLP/Legacy was assigned to Boomerang.

14. On or about November 30, 2016, the building in which Plaintiffs’ loft apartment was located, the real property described as the South Half (S 1/2) of Lot Nine (9) in Block Twenty-One (21) of J. L. Phillips Addition to the City of Sioux Falls, Minnehaha County, South Dakota (“Copper Lounge”), was conveyed by CLP via warranty deed to Boomerang.

15. On or about November 30, 2016, Olympia conveyed to Boomerang via warranty deed certain real property described as Lot 8 and the North Half (N 1/2) of Lot 9, both in Block 21 of J. L. Phillips Addition to Sioux Falls, Minnehaha County, South Dakota (“Skelly’s”).

16. Legacy also held itself out to the public as the owner of the Copper Lounge and/or Skelly’s buildings at various material times.

17. Skelly’s and Copper Lounge were adjacent buildings and shared a common load-bearing wall.

18. Defendants Boomerang, CLP, Olympia, and Legacy initiated and engaged in a construction project involving the Copper Lounge and Skelly’s buildings which involved the demolition of the load-bearing wall shared by the two buildings (the “Project”) with Legacy serving as the Project’s developer.

19. Upon information and belief, Hultgren Construction was formed at the urging of Legacy's principals to act as the general contractor for projects in which Legacy was the developer in an effort to cut costs.

20. Upon information and belief, Legacy, Boomerang, CLP and/or Olympia hired Hultgren Construction to perform construction services for the Project.

21. Aaron Hultgren acted as an agent of Hultgren Construction, Legacy, Boomerang, CLP and Olympia in all of his actions related to the Project.

22. Hultgren Construction and each of its employees and agents lacked the experience, training and competence to perform the construction services that it was hired to perform on the Project in a reasonable and safe manner.

23. Legacy, Boomerang, CLP and Olympia knew that Hultgren Construction lacked the experience, training and competence to perform the construction services that it was hired to perform on the Project in a reasonable and safe manner.

24. Legacy, Boomerang, CLP and/or Olympia lacked the experience, training and competence to manage and oversee the work performed by Hultgren Construction on the Project

25. The construction work associated with the Project presented significant risk of physical injury and property damage to Plaintiffs.

26. None of the Defendants warned Plaintiffs of the risks and dangers posed to them by the Project or advised that Plaintiffs move out during the same. As a result, Plaintiffs continued to reside in their loft apartment in the Copper Lounge building during the construction.

27. In or around the fall of 2016, Hultgren Construction began demolition of the load-bearing wall between the Copper Lounge and Skelly's buildings.

28. Upon information and belief, Defendants did not ensure the demolition activities related to the load-bearing wall were carried out with sufficient safety precautions or that proper shoring mechanisms were used during demolition.

29. Upon information and belief, RISE was the structural engineer for the Project and Legacy, Hultgren, and Hultgren Construction consulted with RISE in regard to the Project, and RISE advised Legacy, Hultgren, and Hultgren Construction in regard to safety precautions and shoring mechanisms for the demolition of the load-bearing wall.

30. Through RISE's performance of services associated with the Project, it knew or should have known of the insufficient safety precautions and shoring mechanisms in place for the demolition of the load-bearing wall and the associated risks of the same.

31. Despite such knowledge, RISE took no action to warn Plaintiffs of the significant dangers and risks posed to them by the continued construction and demolition activities in the space below their apartment.

32. While Plaintiffs were unaware that the wall was a load-bearing wall, they did notice significant cracks on the portion of such wall that was visible in their apartment and alerted Hultgren, Hultgren Construction, Boomerang, Olympia, Legacy, and CLP of the cracks.

33. Despite being alerted of the cracks on the load-bearing wall, none of the Defendants took any action to investigate the cracks or take any other remedial action.

34. On the morning of December 2, 2016, Copper Lounge and Skelly's collapsed as a result of the demolition of the load-bearing wall shared by the two buildings.

35. On the morning of December 2, 2016, Emily slept in her bedroom above the demolition work.

36. On the morning of December 2, 2016, Emily heard a crash and awoke to see her bedroom floor fall away. She rolled out of bed and fell a story and a half onto a pile of rubble on the first floor of the Copper Lounge building. While lying on the ground partially covered by her mattress, the remainder of the Copper Lounge building came crashing down on top of her.

37. On the morning of December 2, 2016, Mike was in the smokeshop located on the first floor of the Copper Lounge building and heard a cracking sound and felt the building shift. He and the smokeshop manager hurried out of the building fearing for their safety. Upon exiting the building, Mike looked back at the Copper Lounge building and, through a haze, saw that the building had collapsed. At this time, Mike was unsure if Emily was in the building or if she had spent the night with friends. Mike called Chris at work and Chris informed him that Emily was asleep in her bedroom. Mike understandably thought that his daughter had been killed in the collapse.

38. On the morning of December 2, 2016, Chris was at work when she received the phone call from Mike that their building collapsed. Chris ran to her car and drove toward the Copper Lounge building knowing that her daughter Emily was in the building at the time of the collapse. As she drove toward downtown, Chris was faced with the inescapable conclusion that her daughter had just been killed. As she approached downtown, her phone rang and the caller ID identified the call coming from Emily's phone. Chris answered her phone and heard the voice of her daughter, Emily.

39. It took three to four hours following the collapse for Emily to be freed from the rubble. During that time, Emily feared for her life as she faced the very real possibility that the debris above could shift resulting in her being crushed or suffocated. Mike and Chris likewise spent those three to four hours fearing that their daughter would be killed during the rescue

effort. Upon being removed from the debris, Emily was immediately transferred to Avera McKennan Hospital for medical attention and treatment.

40. Emily sustained severe physical, mental, psychological and emotional injuries resulting in physical manifestations as the result of the building collapse which injuries are continuing. Such injuries are permanent and have caused past pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss and other damage. In addition, such injuries will cause Emily future pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss and other damage.

41. Mike and Chris sustained severe mental, psychological and emotional injuries resulting in physical manifestations which injuries are continuing. Such injuries are permanent and have caused past pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss and other damage. In addition, such injuries will cause Mike and Chris future pain, suffering, loss of enjoyment of life, medical expense, wage loss, property loss and other damage.

42. In addition, Plaintiffs have come to learn that they were exposed to asbestos while living in their apartment due to the improper and illegal removal of asbestos by the Defendants from the building as part of the Project.

COUNT ONE-- LANDOWNER NEGLIGENCE

(Defendants Legacy, Boomerang, CLP and Olympia)

43. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

44. Defendants Legacy, Boomerang, CLP and Olympia owned all or portions of the Copper Lounge and Skelly's buildings while construction work was negligently being performed in such buildings.

45. Defendants Legacy, Boomerang, CLP and Olympia, as landowners, owed a duty to Plaintiffs to maintain the subject buildings in a reasonably safe condition, to use reasonable care in any operations conducted in the buildings and to warn Plaintiffs of any latent and dangerous conditions on the properties.

46. Defendants Legacy, Boomerang, CLP and Olympia breached their duty to Plaintiffs by failing to prevent or timely cure the dangerous condition created by the removal of the load-bearing wall with inadequate shoring and by failing to warn Plaintiffs of such dangerous condition.

47. As a direct and proximate cause of Defendants' Legacy, Boomerang, and CLP and Olympia's breach, Plaintiffs sustained injuries and damages as set out above.

COUNT TWO--LANDLORD LIABILITY (COMMON LAW)

(Legacy, Boomerang and CLP)

48. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

49. Plaintiffs entered into a lease with CLP and Legacy for the occupancy of the apartment above the former Copper Lounge. Unbeknownst to Plaintiffs, such lease was assigned to Boomerang on November 30, 2016.

50. As Plaintiffs' landlords, Legacy, Boomerang and CLP owed duties of care to Plaintiffs to maintain the leased premises in a reasonable and safe manner, to use reasonable care in conducting construction and other operations on the building in which the leased premises was located and to warn Plaintiffs of any latent and dangerous condition impacting the leased premises.

51. Legacy, Boomerang and CLP breached such duties to Plaintiffs/Tenants by failing to prevent or timely cure the dangerous condition created by the removal of the load-bearing wall with inadequate shoring and by failing to warn Plaintiffs/Tenants of such dangerous condition.

52. As a direct and proximate cause of the negligence of Legacy, Boomerang and CLP, Plaintiffs sustained injuries and damages as set out above.

COUNT THREE--NEGLIGENT HIRING

(Legacy, Boomerang, CLP and Olympia)

53. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

54. Hultgren and Hultgren Construction were hired by Legacy, Boomerang, CLP and/or Olympia to perform construction services related to the Project.

55. Hultgren and Hultgren Construction lacked the experience, training and competence to safely perform the construction services it was hired to perform related to the Project.

56. Legacy, Boomerang, CLP and Olympia knew or should have known that Hultgren and Hultgren Construction lacked the experience, training and competence to safely perform the construction services it was hired to perform related to the Project.

57. Legacy, Boomerang, CLP and Olympia each owed a duty to Plaintiffs to hire a competent contractor to perform construction services related to the Project as Plaintiffs could foreseeably be injured by a failure to do so.

58. Legacy, Boomerang, CLP and Olympia breached this duty by hiring Hultgren and Hultgren Construction.

59. As a direct and proximate cause of the negligence of Legacy, Boomerang, CLP and Olympia, Plaintiffs sustained injuries and damages as set out above.

COUNT FOUR--NEGLIGENT CONSTRUCTION AND SUPERVISION

(Hultgren, Hultgren Construction, Legacy, Boomerang, CLP and Olympia)

60. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

61. Defendants identified in Count Four owed a duty of care to Plaintiffs to perform construction services related to the Project with the skill and care ordinarily and reasonably exercised by others in the construction profession and to supervise and oversee such work to ensure that the it was performed in such manner.

62. Defendants breached such duties resulting in the collapse and complete destruction of the subject buildings which included Plaintiffs' apartment.

63. As a direct and proximate cause of the negligence stated in Count Four, Plaintiffs sustained injuries and damages as set out above.

COUNT FIVE--NEGLIGENCE

(RISE)

64. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

65. RISE owed Plaintiffs a duty to provide professional engineering services relative to the Project with the skill and care ordinarily and reasonably exercised by others in the engineering profession as it was or should have been foreseeable to RISE that Plaintiffs could have been injured or damaged by its failure to do so.

66. RISE had a duty to take reasonable precautions to prevent injuries or damages to Plaintiffs and to warn Plaintiffs of any condition known to RISE that presented an unreasonable risk of harm to Plaintiffs.

67. RISE breached such duties by negligently providing engineering services related to the Project, failing to warn Plaintiffs of dangerous conditions that posed an unreasonable risk of harm and failing to remedy such conditions.

68. As a direct and proximate cause of the negligence of RISE, Plaintiffs sustained injuries and damages as set out above.

**COUNT SIX-- NEGLIGENCE INFLICTION OF EMOTIONAL DISTRESS UPON EMILY
AND MIKE FODNESS**

(All Defendants)

69. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

70. As the result of the negligence identified above of all Defendants which caused the subject buildings to collapse, Emily and Mike Fodness were both made to fear for their own safety and, as a result, both were in the zone of danger created by such collapse.

71. In addition to being made to fear for his own safety, Mike Fodness was forced to observe the serious injury and near death of his daughter.

72. As a direct and proximate result of Defendants' negligence, Emily and Mike Fodness have suffered from and will continue to suffer from severe emotional distress which has resulted in physical manifestations for both.

**COUNT SEVEN--INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS UPON
ALL PLAINTIFFS**

(All Defendants)

73. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

74. Defendants engaged in extreme and outrageous conduct as alleged above in reckless disregard for the safety of Plaintiffs which conduct resulted in the Plaintiffs' apartment, their home, collapsing to the ground and burying Emily alive in the debris.

75. Defendants intentionally caused or recklessly disregarded the probability that their conduct would cause Plaintiffs severe emotional distress.

76. As a direct and proximate result of Defendants' intentional and reckless conduct which nearly killed Emily and caused her to sustain severe and permanent injuries, Plaintiffs have suffered and will continue to suffer severe and disabling emotional distress.

COUNT EIGHT--BREACH OF CONTRACT

(Legacy, Boomerang, and CLP)

77. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

78. Plaintiffs Mike and Chris and Legacy, Boomerang, and/or CLP entered into a lease agreement relative to the, loft apartment in the Copper Lounge.

79. Pursuant to such lease agreement, Legacy, Boomerang and/or CLP agreed to provide Plaintiffs with a habitable space to live during the term of the lease.

80. Pursuant to such lease agreement, Legacy, Boomerang and/or CLP agreed to "abide by all state and local laws regarding repairs" and to "act with due diligence" in making repairs when put on notice of the need for such repairs by the tenant.

81. Plaintiffs Mike and Chris complied with all of their obligations under the lease agreement.

82. Legacy, Boomerang and/or CLP failed to comply with their obligations under the lease agreement, namely, by failing to "act with due diligence" when notified of cracks in the

walls of the apartment, allowing the building to collapse and destroying Plaintiffs' apartment and all of their possessions during the term of the lease.

83. Legacy, Boomerang, and CLP's failures, as identified above, constitute a material breach of the lease agreement.

84. Plaintiffs have suffered damages, including consequential damages, as a result of Legacy, Boomerang, and CLP's breach of contract.

COUNT NINE--PUNITIVE DAMAGES

(Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction)

85. Plaintiffs reallege the above-stated paragraphs as if fully set forth herein.

86. Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction have acted with an intentional and reckless disregard of Plaintiffs' rights.

87. Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction intentionally, willfully, wantonly, and/or recklessly caused Plaintiffs to suffer physical injury and severe mental anguish from nearly dying in the collapse of the Copper Lounge building.

88. Plaintiffs are therefore entitled to punitive damages from Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction in an amount to be determined at trial.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court grant the following relief to Plaintiff:

1. Judgment against Defendants, joint and severally, on all Counts alleged herein and in the amount of general and special damages to be determined during trial plus interest, costs, and attorneys' fees;
2. For punitive damages against Defendants Legacy, Boomerang, CLP, Olympia, Hultgren, and Hultgren Construction; and
3. For such other and further relief, including equitable relief, as the Court deems just and equitable.

TRIAL BY JURY IS HEREBY DEMANDED ON ALL ISSUES

Dated this 13th day of March, 2018.

BALLARD SPAHR LLP

By: /s/ Daniel R. Fritz

Daniel R. Fritz (2390)
101 South Reid Street, Suite 302
Sioux Falls, SD 57103
Telephone: (605) 978-5200
Email: fritzd@ballardspahr.com
Attorneys for Plaintiffs